SHAFRUDDIN BIN SELENGKA

v.

PUBLIC PROSECUTOR & 2 OTHER APPEALS

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SYED AHMAD IDID J.
[CRIMINAL APPEALS NO. 42-102-93, 42-12-93 & 42-2-92/42-90-93]
7 SEPTEMBER 1994

CRIMINAL LAW: Sentencing - Circumstances under which the Court can order concurrent sentences - Lower Court ordering sentences to run concurrently - On appeal prosecution orally applying for consecutive sentence - Whether proper - Accused already undergoing term of imprisonment when convicted - When should imprisonment for present offence begin.

In these three appeals against the sentences imposed by the Subordinate Courts, the Court considered the circumstances under which the Court should order concurrent (or consecutive) sentences and also considered the question of when an accused's imprisonment should begin, where the said accused was already undergoing a term of imprisonment for an earlier offence.

At the hearing of the appeals, insofar as the first case was concerned, wherein the learned Sessions Court Judge had imposed a concurrent sentence, the learned DPP asked the Court to impose a consecutive sentence.

Held:

[1] It was not proper for the learned DPP to suddenly ask the Court for the sentences to run consecutively. If indeed the accused was deserving of such a sentence, the Public Prosecutor should have appealed against the sentences in the first place as provided for by s. 307 of the Criminal Procedure Code (CPC). While the Court may of its own accord enhance a sentence (s. 316(b) CPC) on an accused's appeal for reduction of his sentence, this should only be done in rare and exceptional cases and on good and sufficient grounds being shown.

[2] In the circumstances of the first appeal, having considered the fact that what actually occurred was one robbery against two persons, there was no reason to disturb the learned Sessions Court Judge's order that the sentences run on a concurrent basis.

[3] In the second appeal, the sentence of 10 years imprisonment plus 5 strokes of the rotan on a conviction for gang robbery was ordered to run concurrently with a previous sentence of 7 years and 6 strokes which the accused was undergoing. Taking into account that the accused had a previous conviction for a similar offence in 1986 and in accordance with s. 292 of the CPC, the prison term of 10 years should start from the time the accused's present term of imprisonment ends.

[4] The learned Sessions Court Judge in the third appeal exercised his discretion under s. 292 of the CPC and ordered the sentences to run after the end of the term the accused serves for a previous conviction. While the Court was concerned with the accused's claim that he had a son to take care of, the Court was also concerned with the psychological effect of his crime on the young girl he had molested. As the crimes were serious, the sentence should begin at the expiration of the term of imprisonment to which he has been previously sentenced, in accordance with s. 292(i) of the CPC.

[Orders accordingly].

Cases referred to:
Sau Soo Kim v. Public Prosecutor [1975] 2 MLJ 134 ***(refd)***
New Tuck Shen v. Public Prosecutor [1982] 1 MLJ 27, [1982] CLJ 38 ***(refd)***
Kanagasuntharam v. Public Prosecutor [1992] 1 SLR 81 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 282(d), 292(i), (ii), 307(vi), 313(ii), 314(i), (ii), 315, 316(b), 354
Penal Code, ss. 34, 377, 392, 395, 397

Other sources referred to:
Magistrates' Court Handbook (Malayan Law Journal), pp. 198-199

For the appellants - Unrepresented
For the respondent in Criminal Appeal No. 42-102-93 - Ganesan a/l Somasundram, DPP
For the respondent in Criminal Appeals No. 42-12-93 & 42-2-92/42-90-93 - Mohd Jamil bin Hussin, DPP

JUDGMENT

Syed Ahmad Idid J:
I have decided to write the grounds of the three decisions as they touch on two important aspects which come up frequently in our Subordinate Courts:

(i) when to order concurrent (or consecutive) sentences; and

(ii) in cases where the accused is undergoing imprisonment, when should his imprisonment begin?

Shafruddin bin Selengka

The accused was charged for committing robbery against two persons whilst armed with a deadly weapon (a revolver) in the company of two others - ss. 392 and 397 read with s. 34 of the Penal Code. As the offence(s) took place between the hours of sunset and sunrise, the punishment under s. 392 "may be extended to 14 years and shall also be liable to fine or whipping". He was charged for two separate charges.

He appealed against the sentences passed by the learned Sessions Court Judge of 7 years "dan disebat 3 kali" for each of the 1st and 2nd charges (to run concurrently).

His two accomplices are still at large and it was admitted that a revolver was used. The DPP informed the Court that the accused played a major role at the robbery. The value of the items (cash and gold) seized came up to RM3,800. At the appeal, the learned DPP asked the Court to impose a consecutive sentence.

It was not quite proper for the learned DPP to suddenly ask in Court for the sentences to run consecutively. If indeed the accused was deserving of such a sentence, the Public Prosecutor should have appealed against the sentences in the first place. Section 307 CPC clearly spells out that "any person who is dissatisfied with any ... sentence ... may prefer an appeal to the High Court against such ... sentence ... on the ground ... of the alleged **inadequacy** of any sentence ..."

While I am of the opinion that the better course, where the Prosecution wishes for an enhancement of a sentence, is to file an appeal accordingly, the Court may (within s. 316(b) CPC itself) enhance the sentence where the accused appealed for reduction of his sentence. This, I think, should be done in rare and exceptional cases where only on good and sufficient grounds is such a course preferable.

Where the appeal is for the reduction of sentence, the exercise of the powers to enhance sentence instead can curb or discourage appeals. I am, however, of the view such power ought not to be used willy-nilly as a matter of public policy. If the Public Prosecutor considers the sentence insufficient and he wants the Court to increase or enhance it, the legal course would be for the Public Prosecutor to appeal accordingly.

This should be followed up by a petition stating shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law (s. 307(vi) CPC).

Then at the hearing, the Court may revise the finding and maintain or reduce or enhance the sentence or alter the nature of the sentence [s. 316(b) CPC].

In this case, having considered the fact that actually what occurred was one robbery against two persons, I decided to confirm and maintain the sentences on a concurrent basis. A very useful and instructive discussion this point may be seen in *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134 FC at p. 136-137.

When I ordered that the imposition of concurrent sentences be maintained, I had taken into account the discussion in the **Magistrates' Court Handbook** (by Malayan Law Journal) at pp. 198-199.

Rahmad bin Baidi

The accused faced a charge of gang robbery under s. 395 of the Penal Code. After a trial, he was convicted and sentenced to ten (10) years imprisonment plus 5 strokes of the rotan.

At the time he was convicted, he was undergoing a previous sentence of 7 years and 6 strokes.

The Sessions' Court ordered that the 10 years' imprisonment run concurrently with the term he was serving then.

The Sessions Court Judge in imposing the sentence of imprisonment was of the view that this was to protect the public as such offences were rampant and the safety of property was in jeopardy.

The appellant urged upon the Court that he needed "kasih sayang dan bantuan". He said his old folks live in an Indonesian kampung and that he has repented.

In line with the case of *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27, I took into account that the accused had a previous conviction for a similar offence in 1986.

In accordance with s. 292 CPC, I ordered the prison term to start from the time his present term ends. I could order the imprisonment to start "immediately" (as at date the sentence was passed) but then that would negate the provisions of s. 292(ii) CPC.

Azhar bin Mohd. Nor

The accused was convicted on two charges under sections:

(i) 377B (voluntarily committed carnal intercourse against the order of nature) "dengan memasukkan zakar ke dalam mulut" and

(ii) 354 Penal Code (assault or use of criminal force to a person with intent to outrage her modesty).

On the first charge, he was sentenced to 15 years imprisonment and "6 kali sebatan" and for the second offence to five (5) years and "dua kali sebatan". See *Kanagasuntharam v. Public Prosecutor* [1992] 1 SLR 81 (CCA). The Court ordered that the concurrent sentences are to run after the accused had completed his sentence on an earlier case No. 62-55-90.

The accused had been sentenced in the earlier case on 15 January 1992 to 12 years with three strokes for a s. 377 ("buggery with an animal") offence. He had four other previous convictions of theft (1986), possession of goods over which he could not explain, possession of stolen goods and of theft again, (1987) and robbery while armed with a weapon (1991).

The Sessions Court Judge considering the matter which is the subject of this appeal imposed the sentences on 20 October 1993.

The appellant stated that the sentence of the previous case will end on 25 March 2001 and so if this present sentence were then to begin, he will have to serve in prison till 25 March 2011. He opined that in all he would have to serve 29 years and 6 months which is very long. The appellant is aged 31 and with $^{1}/_{3}$ remission he may only be out when he is 49 years old.

The appellant therefore urged upon the Court to backdate his sentence to the date of his arrest i.e. on 6 March 1991 (not from after the end of the present term in a previous conviction).

The issue I had to deal with was whether the appellant deserved a break. The learned DPP agreed with the learned Sessions Court Judge who exercised his discretion under s. 292 of the CPC.

Section 292(ii) states:

> Nothing in the last preceding subsection shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

and s. 292(i):

> When a person who is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence **either immediately or at the expiration of the imprisonment to which he has been previously sentenced,** as the Court awarding the sentence may direct.

The provisions as to execution of sentence of imprisonment at s. 282(d) CPC specifies that:

> every sentence of imprisonment shall take effect from the date on which the same was passed unless the Court passing such sentence otherwise directs.

Section 292 is in respect of the commencement of imprisonment on a prisoner already undergoing imprisonment, and this is exactly the situation the appellant is in.

While I was concerned with appellant's claim that he has a son to take care of, I was also concerned for the psychological effect his crime has on the young girl (aged 15) whom he had molested. So I rejected his appeal in preference for s. 292(i) and as his crimes were serious, I decided that the sentence in this appeal shall begin at the expiration of the imprisonment to which he has been previously sentenced.

One other factor I took into consideration is the type of crimes he had committed. I hope his imprisonment term will enable some medical treatment to be given to curb his lust and help him reform.

Observations regarding delays in hearing appeals due to absence of the appellant or the respondent

I have come across appeal cases where postponements were granted on more than 15 occasions at the High Court. The excuses advanced were:

(i) the appellant did not appear; or

(ii) the respondent was absent as the notice of appeal was not duly served on him.

In most instances, the appellants or the respondents were individuals e.g. in appeals against convictions and/or sentences or against acquittal respectively.

All officers of the Court including the Deputy Public Prosecutor and Counsel are reminded that:

(a) by s. 313(ii) CPC, "If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit."

The Court may, however, refuse to consider the appeal or to make any such order, in the case of an appellant who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail.

(b) by s. 314(i) CPC, where the respondent is not present and the Court, is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance. The Court will then issue the requisite notice to him for service through the Registrar. Then by s. 314(ii), if the service of such notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

And where an appeal is presented against an acquittal a Judge may issue a warrant directing that the accused be arrested and brought before him, and may commit him to prison pending the disposal of the appeal or admit him to bail [s. 315 CPC].

With all these provisions in the CPC there should not be any more excuses on either side to delay the hearing and disposal of appeals. Learned Counsel will inform their clients to be present and the Deputy Public Prosecutor likewise will act suitably as the occasion may require or when the circumstances may dictate, as the law allows.